IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON, Respondent, v. TREVOR W. EVANS, Appellant.	No. 33356-2-II UNPUBLISHED OPINION

Penoyar, J. – Trevor W. Evans appeals the juvenile court adjudication finding him guilty of first degree child molestation, arguing (1) that the disposition order erroneously prohibited him from using or possessing ammunition and deadly weapons; (2) that the court's reliance on improper opinion testimony denied him his right to a fair trial; and (3) that the court abused its discretion in refusing to consider his request for a special sex offender disposition alternative (SSODA). We affirm the adjudication but remand for modification of the disposition.

FACTS

The State charged Evans with one count of first degree child molestation occurring between April 2, 2004, and December 16, 2004. Because the State wanted to use hearsay statements made by B.S., the five-year-old victim, a *Ryan* hearing[1] was held contemporaneously

[1] *State v. Ryan,* 103 Wn.2d 165, 691 P.2d 197 (1984); RCW 9A.44.120.

with the trial.

The State first called Marnie Slater, the mother of B.S. Slater and B.S.'s father, Sterling Smith, separated when B.S. was 18 months old, but their relationship was amicable and a parenting plan was in place. B.S.'s primary residence was with Slater, her three siblings, and Slater's boyfriend, Casey. B.S. and her twin brother Tucker stayed with Smith on Tuesdays and Wednesdays and every other weekend. Smith lived with his fiancée, Tammy Owens, and her sons, Danny and Evans. Evans was 15 years old at the time of trial.

At times, B.S. would resist visiting her father. On December 16, 2004, when Slater was driving B.S. to Smith's house, B.S. became adamant that she did not want to visit her father. The more Slater tried to convince B.S. to go, the more upset B.S. became. Slater relented and drove B.S. home.

On the way home, B.S. could not stop crying and told her mother that she needed to talk. B.S. said that she was afraid of Evans because he took out his "pee-pee" and put it all over her and that it had been happening a long time. Report of Proceedings (RP) (03/25/05) at 25-26. After assuring B.S. that everything would be fine, Slater called Smith and told him what B.S. had said.

When they arrived home, B.S. wanted Slater to tell Casey, her boyfriend, what had happened. When Casey arrived home, Slater told him what B.S. had said in the car. When Slater asked B.S. where Evans had touched her, B.S. pointed to her vagina and buttocks. When Slater asked if Evans hurt her, B.S. said yes. B.S. said that the last touching occurred during the previous Tuesday visit when Smith and Owens left to pick up pizza. B.S. said that the touching happened while she was on the computer and also in Evans's bedroom. She said that Evans told

her not to tell.

The next day, Smith asked B.S. to tell him what had happened at his house with Evans. B.S. repeated that Evans had touched her and pointed to her vagina and bottom when Smith asked where. She said that Danny and Tucker were in the living room watching television when it happened, and that Smith and Owens were not there. B.S. was unclear as to how many times the touching had occurred, but she remembered that it was the day she wore her tie-dye dress. Smith remembered that B.S. had worn this dress the prior Tuesday, when he and Owens picked up pizza from a nearby restaurant.

A few days later, when Slater and B.S. were shopping, B.S. stopped and said, "Mom, [Evans is] going to say that it's not true,… but it is, I promise." RP (03/25/05) at 33. A few days after that, B.S. came up to Slater in the bathroom and said, "Mom, I said that it happened one time, but it happened more than once." RP (03/25/05) at 34. B.S. brought up the touching again when Slater told her they were going to the doctor. She said, "Mom, I told dad that my potty hurt when I was at your house, but it hurt when I was at his house, too." RP (03/25/05) at 37.

The State then called B.S. She recited the alphabet, counted to 20, and knew various colors. She knew her age, her teacher's name, and that Santa brought her toys for Christmas. She also answered a series of truth/lie flash cards. In lieu of an oath, the judge asked B.S. whether she understood that he was the boss and that she would get into trouble if she lied in court. B.S. said that she understood and would tell the truth.

B.S. testified that Evans had touched her bottom with his hand. She said she saw Evans's pee spot in his bedroom and that when she and Evans were lying under the covers of his bed, he asked her to touch it. When she did, it was hard. She saw white stuff come out of Evans's pee spot and go onto the bed. She was able to say

that Evans's penis was the same color as his skin, draw a picture of it, and correctly say where it was located on his body. She said that Evans told her not to tell anyone what had happened. She also said that Evans had touched her pee spot with his penis over her clothes. She said that some of this touching occurred on the day that Smith and Owens left the house to get pizza.

Smith testified that he left Evans in charge when he and Owens left for pizza but added that the four children were acting normally when they returned.

Deputy Pat Schallert testified that she spoke to B.S. about the incident, and also to Slater, Smith, and Evans. When the State asked her about B.S.'s behavior during the interview, Schallert responded that B.S. was very sincere and serious. She added that it did not appear that B.S. had been coached.

On cross examination, the defense questioned Schallert closely about her investigation and her failure to interview B.S.'s sister Danika, her mother's boyfriend Casey, and Evans's brother Danny: "[W]ouldn't you agree. . . that a fair, thorough, accurate investigation would have included talking to those three people?" RP (04/01/05) at 13. Schallert responded as follows:

> At the time, I felt that [B.S.'s] disclosure was very sincere. The information she relayed was something that only someone who possibly had experienced that would have that information, being five years old.

RP (04/01/05) at 13. Defense counsel did not object to or pursue this response, but she did ask Schallert if it was her opinion that B.S. did not appear to be coached. Schallert acknowledged that this was opinion testimony that could be considered speculative.

After the State rested its case, the court made its decision regarding the *Ryan* hearing. The court ruled that B.S. was competent and that the statements made to her mother and father were admissible.

Evans then testified and denied touching

B.S. inappropriately. He said that she would have been in his bedroom for 30 seconds, at most, with the door open.

Danny also testified. He remembered that once when Smith and Owens went to get pizza, B.S. and Evans were in the bedroom for 15 minutes with the door closed.

The court found Evans guilty as charged and explained its decision as follows:

> Having considered all of the testimony in this case, these are the things that are the most compelling to me: When [B.S.] made the revelation, or the accusation, she was under no influence, any external influence, to do so. She was highly emotional, spontaneous, fairly consistent. Fairly consistent. It was not completely consistent.
> . . .
> The—I think the things that are the most compelling to me are the—that—are that [B.S.] has some information that five-year olds shouldn't have. She's aware that penises have erections. The fact that she might know what a penis looks like is not necessarily--at all mean that she knows what an erect penis looks like, or that an erect penis is hard as opposed [to] soft. That seminal fluid is clear or white to clear, rather than the color of urine. Those are fairly compelling.
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> The Defendant's testimony is that it did not happen and could not have happened. I don't find that the testimony that it could have not happened absolutely compelling, it could happen. The question is: Am I convinced beyond a reasonable doubt that it did happen? It's easier to say that it didn't, but I'm convinced that it did. I'm satisfied beyond a reasonable doubt that it happened. There was some sexual contact. I can't think of any reason why [B.S.] would not be honest about that, and she's fairly consistent that it happened.

RP (04/01/05) at 133-35.

The parties then discussed the matter of sentencing. The State recommended a SSODA evaluation but added that it was not necessarily recommending a SSODA and did not usually do so where the case went to trial. Defense counsel wondered whether there was any point to an evaluation because Evans denied the charge and would be appealing. The court ordered a SSODA evaluation.

When the parties returned for sentencing, probation officer Robert Wagner informed the court that the results of Evans's two polygraphs were inconclusive. During the polygraphs, Evans did not admit to the offense. Wagner had asked Dr. John Ingram, who was going to perform the psychological portion of the evaluation, to determine whether he could proceed. Dr. Ingram told Wagner that the evaluation would be futile because without Evans's history and admission to the offense, he could not be amenable to treatment. Wagner recommended that the court impose a guideline sentence.

Defense counsel was very concerned with the court sending Evans to the juvenile institution and reiterated that Evans would appeal the finding of guilt. She stated that Evans hoped to start SSODA, be cooperative, and do what he needed to do to stay out of the juvenile institution while his appeal was pending. She asked the court to order the evaluation to continue without a valid polygraph, order a SSODA without the evaluation, or allow time for a third polygraph examination. The State did not object to an additional polygraph. The court responded with these observations:

> I guess this is my perspective. [Evans is] fifteen, which is young. He's struggling with sexual issues. He committed the offense. My particular interest is in treatment. There's a huge stigma involved with this sort of behavior. The stigma is so great, or the shame is so great, that there are huge amounts of denial around it, which is what I see happening.
>
> And the alternatives are, for someone in [Evans's] position . . . : Admit that it happened or remain in denial. Admit what happened and you get into treatment and we move on, we deal with the problem and we get beyond it. If we remain in denial, we never admit the problem, he can maintain what I guess he believes is his dignity. That's the price.

RP (05/18/05) at 7-8. The court posed the following question to the defense: "Are we going into a treatment mode because there's a problem, or not?" RP (05/18/05) at 10. The court set the disposition over for one week for Evans to

make his choice between treatment or a standard range sentence.

When the parties returned on May 24, the defense informed the court that Evans had taken a third polygraph. Although the results were inconclusive, the polygrapher believed Evans was telling the truth when he said he had not committed the crime. Counsel asked the court for more time so that the polygrapher could file a formal report and so that Dr. Ingram could attempt an evaluation based on the new report.

When the court asked whether this was a question of guilt or innocence or of appropriate disposition, defense counsel answered that it was both. Counsel and the court agreed that they were at an impasse. The State responded that treatment would work only if there were an admission, since a person could not be treated for a problem he denied having. The State did not think a SSODA was appropriate and asked the court to proceed with sentencing.

The court responded that it had set the matter over so that Evans could choose between admitting the offense and getting treatment, or denying the offense and getting the standard range. The court felt that Evans had made his choice, and it imposed a standard range disposition of 15 to 36 weeks in the juvenile institution.

Evans now appeals.

DISCUSSION

I.

Evans argues initially that the order of adjudication and disposition erroneously prohibits him from possessing and using ammunition and dangerous weapons. The State concedes that these prohibitions have no legal support and that the matter must be remanded for removal of these provisions from Evans's disposition order.

II.

Evans argues next that he was denied his right to a fair trial when a witness gave opinion testimony about B.S.'s credibility.

At issue here is Deputy Schallert's response when defense counsel cross examined her about her limited investigation of B.S.'s allegations. Schallert justified her failure to interview three potential witnesses by stating, "At the time, I felt that [B.S.'s] disclosure was very sincere. The information she relayed was something that only someone who possibly had experienced that would have that information, being five years old." RP (04/01/05) at 13.

Although Evans did not object to this response at trial, he claims that the alleged error is reviewable on appeal as a manifest constitutional error. *See* RAP 2.5(a)(3) (party may raise manifest constitutional error for the first time in appellate court). When such a claim is raised, this court must determine whether the error raises a constitutional issue and then determine whether the error is manifest. *State v. Jones,* 71 Wn. App. 798, 809-10, 863 P.2d 85 (1993). If the error is manifest, we will address its merits, and if error was committed, we will apply a harmless error analysis. *Jones,* 71 Wn. App. at 810.

Evans's claim of error does raise a constitutional issue, as no witness may testify as to an opinion on the defendant's guilt either directly or inferentially. *Jones,* 71 Wn. App. at 813. Such testimony can be constitutional error because it invades the province of the jury, thus infringing on a defendant's constitutional right to trial by jury. *Jones,* 71 Wn. App. at 813; *see also State v. Demery,* 144 Wn.2d 753, 759, 30 P.3d 1278 (2001). The constitutional guarantee of a trial before an impartial jury applies to a trial before a judge. *State v. Carlin,* 40 Wn. App. 698, 701, 700 P.2d 323 (1985), *overruled on other grounds, City of Seattle v. Heatley,* 70 Wn. App. 573, 854 P.2d 658 (1993). Thus, in a bench trial as

well as a jury trial, a witness's opinion regarding the defendant's guilt improperly invades the province of the impartial fact finder. *Carlin,* 40 Wn. App. at 701-02.

Had it been elicited by the State during direct examination, Schallert's statement regarding B.S.'s credibility might have constituted manifest error. *See State v. Kirkman,* 126 Wn. App. 97, 106-07, 107 P.3d 133 (State's solicitation of statements regarding victim's credibility constituted manifest constitutional error), *review granted,* 155 Wn.2d 1014, 124 P.3d 304 (2005). However, under the doctrine of invited error, a party who sets up a constitutional error at trial may not later complain of it on appeal. *State v. Pam,* 101 Wn.2d 507, 511, 680 P.2d 762 (1984), *overruled on other grounds, State v. Olson,* 126 Wn.2d 315, 893 P.2d 629 (1995).

Counsel announced at the beginning of trial that the cross examination of Schallert would be a "critical piece of our defense." RP (03/25/05) at 4. During that cross examination, counsel asked Schallert several questions about her failure to question potential witnesses before she attempted to justify the scope of her investigation by referring to B.S.'s credibility. Counsel made no attempt to strike that testimony as improper or nonresponsive and referred to Schallert's allegedly incomplete investigation several times during closing argument. Counsel described Schallert's failure to interview certain witnesses as "very crucial," "astounding," "highly suspect," and indicative of a "bare bones" investigation. RP (04/01/05) at 120-21, 123. She concluded her argument with this reference to the investigation: "We don't know what Casey or Danika or Danny might have told the police, because we don't have that information, it wasn't gathered, it wasn't seen fit to gather." RP (04/01/05) at 127-28.

Exposing the weaknesses in Schallert's investigation was central to the defense strategy at trial. By asking Schallert about her failure to interview several witnesses, defense counsel ran the risk that Schallert would attempt to justify her

actions. Under the circumstances, we find the alleged error to be invited and not subject to appellate review.

III.

Evans also argues that the juvenile court failed to exercise its discretion in considering his request for a SSODA sentence.

RCW 13.40.160(3) permits a juvenile court to suspend a sex offense disposition upon the condition that the juvenile participate in community-based sex offender treatment. *State v. Diaz-Cardona,* 123 Wn. App. 477, 480, 98 P.3d 136 (2004). Thus, before imposing a SSODA authorized by RCW 13.40.150(3), a court must determine that the treatment disposition provided for is appropriate for the particular offender involved. *State v. Howell,* 119 Wn.2d 513, 517, 833 P.2d 1385 (1992). Before making that determination, a juvenile court may order an examiner to evaluate whether the offender is amenable to treatment. RCW 13.40.160(3).

The ultimate decision whether to impose a SSODA lies completely within the juvenile court's discretion. *Diaz-Cardona,* 123 Wn. App. at 481. However, where a defendant has requested a sentencing alternative authorized by statute, the categorical refusal to consider that alternative is a failure to exercise discretion that is subject to reversal. *State v. Grayson,* 154 Wn.2d 333, 342, 111 P.3d 1183 (2005).

Evans argues here that the juvenile court failed to exercise its discretion when it ruled that he was not eligible for a SSODA because he denied committing the offense charged. As stated above, however, the trial court was required to find Evans an appropriate candidate for treatment before imposing a SSODA, and the record supports the court's conclusion that there was no basis for such a finding. Evans sought a SSODA primarily to avoid placement in a juvenile rehabilitation facility. Thus, the request for a

SSODA appeared to be a plea for leniency rather than a request for treatment, similar to the defendant's request for a SSOSA[2] in *State v. Sanchez,* 146 Wn.2d 339, 46 P.3d 774 (2002). In *Sanchez,* the defendant maintained that he was perfectly healthy. The Washington Supreme Court held that the trial court did not abuse its discretion in ruling that such a defendant was not amenable to treatment and therefore not an appropriate SSOSA candidate. *Sanchez,* 146 Wn.2d at 355.

Here, too, there was nothing to support a finding that Evans was amenable to treatment. The trial court wrestled with the question of his disposition, and its ultimate conclusion that a SSODA was not appropriate was neither a refusal to exercise discretion nor an abuse of discretion.

Affirmed and remanded for correction of the order of adjudication and disposition in accordance with this opinion.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record pursuant to RCW 2.06.040, it is so ordered.

PENOYAR, J.

We concur:

HOUGHTON, P.J.

[2] A special sex offender sentencing alternative is the sex offender sentencing option for adult offenders. RCW 9.94A.670(2).

BRIDGEWATER, J.